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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ZACHARY V. DOUGLAS,

Plaintiff and Appellant,

v.

CALIFORNIA STATE POLYTECHNIC  
UNIVERSITY et al.,

Defendants and Respondents.

B201714

(Los Angeles County  
Super. Ct. No. BC356978)

APPEAL from orders of the Superior Court of Los Angeles County, Peter Joseph Meeka, Judge. Appeal dismissed in part and order affirmed in part; order reversed.

Donald D. Douglas; and Arshak Bartoumian for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, David S. Chaney, Chief Assistant Attorney General, James Schiavenza, Senior Assistant Attorney General, Richard J. Rojo, Supervising Deputy Attorney General, and Sandra Barrientos, Deputy Attorney General, for Defendants and Respondents.

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On September 27, 2006, plaintiff, a student at California State Polytechnic University at Pomona (Cal Poly), filed this action against Cal Poly and six individuals, alleging 12 causes of action arising out of his alleged mistreatment by an instructor and a broken toe sustained in a physical education class. A first amended and a second amended complaint followed.

The served defendants, Cal Poly and three individuals, demurred to the second amended complaint. Plaintiff filed opposition papers. By minute order dated June 19, 2007, the trial court sustained the demurrer without leave to amend as to some causes of action, sustained the demurrer with leave to amend as to others, and overruled the demurrer as to still others. On October 24, 2007, the court entered an order dismissing the causes of action as to which the demurrer was sustained without leave to amend.

Also on June 19, 2007, pursuant to an order to show cause and on its own motion, the trial court, by minute order, dismissed the complaint as to the three remaining individual defendants for lack of timely service, citing Code of Civil Procedure section 583.250. A formal order of dismissal, citing the same statute, was entered on October 24, 2007.

According to the “Register of Actions,” also known as the “Civil Case Summary,” a third amended and a fourth amended complaint have since been filed.

#### **A. The Demurrer**

Plaintiff limits his appeal from the order of dismissal on the demurrer to the causes of action against two individual defendants, Norman S. Nise, the instructor, and David E. Johnson, the director of judicial affairs at Cal Poly. “[I]t ‘has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment.’” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699; accord, *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4.) A judgment or an order of dismissal is appealable if it terminates the entire action as to one or more, but not all, defendants. (See *California Dental Assn. v. California Dental Hygienists’ Assn.* (1990) 222 Cal.App.3d 49, 58–60; *Tinsley v. Palo Alto Unified*

*School Dist.* (1979) 91 Cal.App.3d 871, 879–880; *Johnson v. Master Fan Corp.* (1960) 181 Cal.App.2d 569, 570–572; see also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740–744.) In that event, the order may be appealed as to the dismissed defendants only. (See *California Dental Assn.*, at pp. 59–60.)

### **1. Defendant Nise**

The trial court’s minute order on the demurrer indicates that Nise *unsuccessfully* challenged the defamation claim against him. Consequently, the order of dismissal on the demurrer did not terminate the *entire* action as to him, and we have no jurisdiction over that portion of the appeal. (See *California Dental Assn. v. California Dental Hygienists’ Assn.*, *supra*, 222 Cal.App.3d at p. 59.)

### **2. Defendant Johnson**

The two causes of action against Johnson were dismissed without leave to amend, terminating the entire action as to him. Thus, we have jurisdiction over that portion of the appeal.

In the second amended complaint, plaintiff alleged that Johnson conducted an unfair and biased investigation into the incident in which plaintiff broke his toe during physical education class. In addition, Johnson allegedly did not disclose information sought by plaintiff, including the identity of the person who was “sparring” with plaintiff when he sustained the injury.

As pleaded, the claims against Johnson (the 11th and 12th causes of action) asserted a violation of plaintiff’s federal civil rights, specifically, his “due process rights of liberty, property and pursuit of happiness.” In his appellate briefs, plaintiff goes further, asserting that his civil rights claims were, or could be, based on (1) the federal due process clause, (2) a federal criminal statute (18 U.S.C. § 242), (3) the state due process clause, (4) several state constitutional provisions, and (5) several state statutes. Plaintiff invoked title 42, section 1983 of the United States Code (section 1983) as the basis for jurisdiction as to all of these theories of liability. Section 1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”

““Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’” . . .” (*Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 406.) “An action under section 1983 ‘encompasses violations of federal statutory [law] as well as constitutional law.’ . . . [S]ection 1983 may be used to enforce rights created by both the United States Constitution and federal statutes. . . . But conduct by an official that violates only state law will not support a claim under section 1983.” (*Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 116, citations omitted.)

It follows that plaintiff’s section 1983 claims cannot be based on any source of *state* law, whether constitutional or statutory. Further, the federal criminal statute on which plaintiff relies — title 18, section 242 of the United States Code — is the *criminal counterpart* of section 1983. (See *Lugar v. Edmondson Oil Co., Inc.* (1982) 457 U.S. 922, 929, fn. 13 [102 S.Ct. 2744].) Thus, the statute can be enforced only by the United States in its capacity as prosecutor (*Cok v. Cosentino* (1st Cir. 1989) 876 F.2d 1, 2) and does not support a civil action under section 1983 (see *ibid*; *Aldabe v. Aldabe* (9th Cir. 1980) 616 F.2d 1089, 1092).

Finally, “the Due Process Clause protects individuals against two types of government action. So-called “substantive due process” prevents the government from engaging in conduct that “shocks the conscience,” . . . or interferes with rights “implicit in the concept of ordered liberty,” . . . . When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. . . . This requirement has traditionally been referred to as “procedural” due process.” (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1178, fn. 28.) Neither type of government conduct gives rise to a civil action, however, unless it implicates a protected interest in life, liberty, or property. (*Id.* at

pp. 1178, 1184.) Plaintiff has failed to allege a protected interest. He does not cite any authority or provide a coherent argument for the proposition that federal law required Johnson (1) to conduct the investigation in a particular manner or (2) to disclose any information obtained through it. Although the due process clause protects a student's property interest in obtaining a *compulsory* public education (see *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1062–1063), Johnson's investigation did not interfere with that right. Accordingly, plaintiff did not sufficiently allege a violation of due process.

We therefore conclude that the trial court properly sustained the demurrer without leave to amend as to the causes of action against Johnson.

## **B. Dismissal for Failure to Serve Process**

The trial court cited section 583.250 of the Code of Civil Procedure (§ 583.250) in dismissing the unserved defendants for failure to effect service of process. But that statute — with exceptions not relevant here (see Code Civ. Proc., §§ 583.220–583.240) — permits dismissal only if a defendant has not been served within three years after the action has commenced. (See Code Civ. Proc., § 583.210.)

In its brief, Cal Poly expressly declines to address the propriety of the trial court's order on the ground that “Respondents do not include the unserved defendants.” Cal Poly concedes, however, that the unserved defendants were dismissed pursuant to section 583.250 and that the dismissal was entered “approximately nine months after the complaint was filed.”

In discussing this issue, none of the parties mentions the California Rules of Court. Nor do we find any of those rules cited in the record. Yet, rule 3.110(b) provides: “The complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint. . . .” And rule 3.110(f) states: “If a party fails to serve and file pleadings as required under this rule, and has not obtained an order extending time to serve its pleadings, the court may issue an order to show cause why sanctions shall not be imposed.” Rule 3.110 is expressly authorized by Government Code section 68616,

subdivision (a). That statute, too, is nowhere to be found in the parties' briefs or, to our knowledge, in the record. Accordingly, we decline to discuss these sources of trial court authority.

Because section 583.250 permits up to three years to effect service of process, the trial court erred in dismissing the unserved defendants approximately nine months after the complaint was filed.

### **C. Request for Appellate Injunctive Relief**

In his opening brief, plaintiff requests that this court issue an injunction instructing the trial court to order Cal Poly to turn over certain information concerning the “incident” — which he calls a “battery” — that caused his injury in the physical education class.

Plaintiff's request is based on Government Code section 6254, subdivision (f) (§ 6254(f)), which states in part: “[S]tate and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident . . . and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951 . . . .”

Assuming for purposes of argument that section 6254(f) applies to Cal Poly or another defendant, plaintiff has not shown that he requested such relief in the trial court. We *review* the *trial court's* decisions for error. Here, an application for injunctive relief should have been made below in the first instance.

## **DISPOSITION**

The appeal from the order of dismissal on the demurrer as to defendant Norman S. Nise is dismissed for lack of jurisdiction. That portion of the order of dismissal on the demurrer as to defendant David E. Johnson is affirmed. The order of dismissal pursuant to section 583.250 of the Code of Civil Procedure is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.\*

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\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.